EC-P-1998-27

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 1 - 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Revised Guidance on Enforcement During Pending SIP Revisions

FROM: Michael S. Alushin
Associate Enforcement Counsel for Air
Office of Enforcement

John B. Rasnic, Acting Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Addressees

Attached is final guidance on the above-referenced subject. We issued this guidance in draft on December 19, 1990. The final policy attempts to reflect comments received from several of the Regions submitted in response to that draft.

Existing guidance (Aug. 29, 1989) attempted to adapt Agency policy to the unsettled judicial landscape which prompted the Supreme Court to grant certiorari to hear the General Motors case. Now that the Supreme Court has overturned unfavorable precedents which had restricted EPA authority, and the Clean Air Act Amendments of 1990 have added a new twelve month SIP revision review deadline, we have developed this guidance to encourage more vigorous federal enforcement of state implementation plans.

Some commenters asked for clarification of the meaning of "high probability" in Subpart D of the new policy. The draft has been amended to make clear that only SIP revisions which have been formally proposed by the State may have a high probability of approval. Assessing the likelihood of approval, prior to reviewing the supporting data contained in a formal application by the State, in most instances would be inherently difficult. Moreover, timely submittal of complete SIP revision applications should be encouraged.

One commenter asked that we define "adverse environmental impacts" in Part I, Subpart C, to include non-quantifiable impacts such as damage to the Agency's integrity. We have done so. This same commenter asked that we remove the paragraph discussing the old guidance to avoid confusion. Since the new

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guidance supersedes the old, we are in agreement that inclusion of this paragraph would be surplusage and potentially confusing to cursory readers. We, therefore, have removed it.

Another commenter suggested that we expand the discussion on factors contributing to prejudice to defendants. In response we have asked that Regions consider, among other added factors, whether the existence of a collateral suit indicates the defendant has been prejudiced.

In conclusion, the need for more vigorous SIP enforcement has been amplified by our continuing ozone nonattainment problem and an anticipated increase in the number of proposed SIP revisions resultant from the 1990 Amendments. We are hopeful this document will provide valued assistance to the Regions in their efforts to enforce state implementation plans.

This guidance supersedes the "Revised Guidance on Enforcement of State Implementation Plan Violations Involving Proposed SIP Revisions," dated August 29, 1989. Please insert this document in its place at Part E, Document #32 of the Clean Air Act Policy Compendium.

Attachment

Addressees:

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Less than a year following our last guidance document addressing the above subject (August 29, 1989) the United States Supreme Court handed down its decision in General Motors Corp. v. United States (GM), ___ U.S. ___, 110 S. Ct. 2528 (1990), which affirmed the Agency's authority to bring enforcement actions even after EPA review of proposed State Implementation Plan (SIP) revisions has exceeded four months. In addition, the Clean Air Act was amended in October, 1990 to include, inter alia, a new 12 month review period for proposed SIP revisions.

In the wake of both this ruling and the recent amendments[1] to the Act, this revised guidance is intended to assist the Regions in deciding when to bring enforcement actions while SIP

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[1] §110(a)(3), 42 U.S.C. §7410, of the amended Act imposes a twelve month deadline for EPA SIP revision review:

> Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

revisions are pending. It should be emphasized from the outset that the Supreme Court's ruling in GM has substantially lowered the level of caution which must be exercised in deciding whether to bring cases involving proposed SIP revisions, even in those instances where the new 12 month period has been exceeded.

This document begins with a statement of the Agency's new policy on SIP enforcement during the pendency of proposed revisions. Background material and a summary of the Supreme Court ruling in GM follow the policy statement.

I. POLICY

The Supreme Court's recent ruling in GM, in conjunction with the 1990 amendments to the Clean Air Act, have resulted in a marked shift in the law regarding EPA's enforcement authority during the review of proposed SIP revisions. The ruling in GM affirms the Agency's authority to enforce existing SIPs, even when the Agency has unreasonably delayed the review of proposed revisions. The remedy for unreasonable Agency delay is a suit to compel Agency action or a diminution in penalties depending on the degree of prejudice caused to the defendant. Although the amendments create a presumption that Agency review beyond 12 months constitutes unreasonable delay, our authority to enforce the existing SIP, through penalties or injunctive relief, remains after that date. In short, GM has effectively reduced, but not eliminated, the level of caution to be exercised when the Agency has consumed more than 12 months in reviewing SIP revisions.

This guidance encourages Regions to vigorously pursue violators of existing SIPs with a sensitivity for the particular facts of individual cases. The guidance sets forth factors to consider, in addition to those enumerated in the October 10, 1990, memorandum on Enhanced Regional Case Screening, in selecting appropriate enforcement responses to SIP violations involving pending review of proposed SIP revisions. The list has been developed in consideration of GM's holding on the issue of the appropriate remedy for unreasonable Agency delay in reviewing proposed SIP revisions. The holding is two-fold; (1) a defendant may obtain reductions in penalties commensurate with a trial court's determination of the degree of prejudice caused to a defendant by EPA's delay; and, (2) EPA will be subject to collateral citizen suits to compel Agency action for unreasonable delays in reviewing SIP revisions. Following is a list of factors Regions should consider in determining appropriate enforcement responses in SIP cases affected by proposed revisions which have been pending before the Agency for more than 12 months.

A. Need For Injunctive Relief In Cases of Ongoing Noncompliance

Despite the existence of unreasonable Agency delay in reviewing a particular SIP revision for more than 12 months, if a case justifies injunctive relief for an ongoing violation, the Region should proceed with civil enforcement. Since the primary purpose of such cases is to compel compliance, the risk of any diminution in penalties is of secondary concern. Cases involving compliance with a proposed revised SIP, which is likely to be approved, are discussed in Subpart C of this Part.

B. Penalty-Only Cases Involving A Long Period of Noncompliance In Comparison To The Length of Agency Delay

In the wake of GM, trial courts in enforcement actions will take into consideration the degree of prejudice caused to defendants by Agency delay in reviewing proposed SIP revisions for longer than the 12 months allotted by the Act. Therefore, the utility of proceeding with penalties-only actions diminishes in proportion to the degree of prejudice caused to a defendant. Regions should consider the period of noncompliance[2] in relation to the period of unreasonable EPA delay in reviewing SIP revisions beyond 12 months in deciding whether to pursue a penalties-only action.

Therefore, in those cases which involve a comparatively long period of noncompliance in relation to the length of EPA's delay in reviewing a proposed SIP revision beyond 12 months, the Region should proceed, absent other factors militating against the suit. If, however, the period of noncompliance is short in comparison to the period of EPA delay, and other factors which would tend to increase the penalty (ie. significant environmental impact and economic benefit) are absent, Regions may want to consider withholding the action. The anticipated penalty recovery in such cases may not justify the resource burden placed on the Agency and the Department of Justice to litigate the case. Once again, if there exists a need for injunctive relief, Regions should proceed irrespective of any elevated risk that the penalty will

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[2] Please note that the Clean Air Act Amendments of 1990 amended paragraph (e) of §113, 42 U.S.C. §7413, to effectively shift the burden of proof to defendants on the issue of ongoing violations. New §113(e) states that, for the purposes of determining the number of days of violation for which a penalty may be assessed, once the Government makes a prima facie showing, the days of violation shall be presumed to include the date of notice issued to the source of the violation, and each and every day thereafter until the violator establishes continuous, or intervening, compliance.

be reduced.

C. Cases Involving A High Probability That The Proposed SIP Revision Will Be Approved

In instances where the source is in compliance with a proposed SIP revision submitted in a formal application by the State, and which has a high probability of approval, the need for injunctive relief does not exist. However, there may still exist a justification for pursuing penalties, particularly where the source has been in violation of the existing SIP for a substantial period.

Therefore, where there exists a high probability that the proposed SIP revision will be approved, the Region should once again consider the length of noncompliance in relation to the length of unreasonable Agency delay in reviewing the proposed revision. If the length of noncompliance is substantial in relation to the length of EPA delay, the Region may still wish to pursue a penalties-only claim despite imminent approval of the pending SIP revision.

However, as in any case, the Region should weigh the particular equities of each case in deciding whether a penalties-only claim is merited. If the source's noncompliance with the existing SIP is technical in nature, and does not have adverse environmental impacts[3], a penalties-only action may be inappropriate notwithstanding a lengthy period of noncompliance. Alternatively, in those rare cases where a source obtains relief through a SIP revision which allows it to gain some economic advantage with adverse environmental consequences, a penalties-only claim may be warranted; especially if the period of noncompliance with the existing SIP is lengthy.[4]

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[3] Adverse environmental impacts are not limited solely to quantifiable environmental impacts. They also may include damage to the Agency's broader deterrence aims in the regulated community which may result from unaddressed noncompliance with the existing SIP.

[4] An example is an emission violation caused by the source turning off control equipment prior to obtaining the SIP revision allowing it to do so. In this case, the source has obtained an economic benefit from noncompliance, while causing adverse environmental impact. A penalties-only action is merited for the regulatory process violation.

D. Whether The Existence of A Collateral Suit Compelling Agency Action On A Proposed SIP Revision Indicates Prejudice

An additional remedy available to regulated entities for Agency delays in reviewing proposed SIP revisions is a collateral suit to compel the Agency to act. Although the Supreme Court in GM clearly ruled that the existing SIP remains enforceable regardless of the pendency of any proposed revisions,[5] the existence of a collateral suit to compel Agency action on a pending SIP revision may affect the selection of the enforcement response to the extent that it indicates the source is being prejudiced by the delay.

Therefore, the Regions should consider whether the defendant has sought to compel Agency action on the proposed revision when evaluating whether the defendant is suffering any actual prejudice from EPA's delay on the SIP revision.

E. Assessing The Degree of Prejudice To The Defendant

Additional considerations may bear on the extent of possible prejudice to the defendant. Clearly, if a defendant is not in compliance with the proposed SIP revision, then little prejudice has resulted. However, if the defendant is in compliance with the proposed revised SIP, and the revisions to the SIP will significantly reduced the defendant's compliance costs, then EPA delay in processing the proposed revision may very well cause prejudice to the defendant. In this case, the Region should weigh the period of noncompliance against the period of EPA delay as outlined above. Related factors which may support a decision to bring a SIP enforcement action include whether the defendant failed to make a good faith effort to comply with the existing SIP or failed to plan for the possibility that the SIP revision could be denied.

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[5] The GM Court recognized that the existing SIP remains enforceable despite delay in review of a proposed revision. "The language of the [CAA] plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an 'applicable implementation plan'...[t]here can be little doubt that the existing SIP remains the 'applicable implementation plan' even after the State has submitted a proposed revision...[t]here is nothing in the statute that limits EPA's authority to enforce the 'applicable implementation plan' solely to those cases where EPA has not unreasonably delayed action on a proposed SIP revision." 110 S.Ct. at 2533-34.

F. Pre-Amendments Cases

Certain cases may involve a period of noncompliance, and a now completed review of a proposed revision, both of which occurred prior to the 1990 Amendments to the Act. Since the new 12 month period cannot be applied retroactively, EPA's conduct in reviewing proposed SIP revisions will be subject to the standard existing before the amendments. In other words, the reasonableness standard set forth in GM is applicable. Under that standard, the court will look to the particular circumstances surrounding EPA's review of the proposed SIP revision to determine if the length of time taken by the Agency was "reasonable" pursuant to the mandates of the APA. If the Agency can demonstrate that the length of time consumed in reviewing the SIP revision was reasonable, then a fortiori a defendant cannot be prejudiced by that delay and a district court cannot reduce penalties on this ground.

Factors which may support a decision to bring a SIP enforcement action under these rather limited circumstances include whether: (1) the notice and comment period has been extended; (2) significant comments on proposed SIP revisions were received after the comment period ended; (3) the Office of Management and Budget reviewed the disapproval; (4) negotiations between the Region and the State occurred to resolve issues in advance; (5) the proposed revision required a complex equivalency determination; and, (6) the proposed revision required a determination of "Reasonable Further Progress" in a nonattainment area.

II. Background

EPA currently reviews approximately 150 to 200 SIP revisions each calendar year. Although the projected review time for such revisions is fourteen months, in fact less than half of these revisions are processed within this time period. Moreover, in some instances, SIP revisions have taken four to five years to review. Even with the administrative steps taken by EPA to streamline the process (See State Implementation Plan Processing Reform: Notice of Procedural Changes, 54 FR 2214, January, 19, 1989), and legislation establishing a longer deadline, SIP enforcement cases will continue to be affected by SIP revisions.

In the past several years, the number of SIP enforcement cases has declined substantially. This drop-off is cause for some concern since the number of SIP violations during this period has probably remained constant or even increased. Although there are a number of reasons for this diminution, a principal reason is that recent lower court decisions have ruled against the agency in SIP enforcement actions for what was deemed unreasonable agency delay when review of proposed SIP revisions exceeded four months. The Agency is hopeful, however, that the

Supreme Court's recent decision in GM, in conjunction with the amendments, will result in an increase in the number of SIP enforcement actions in the coming months.

In the near future, proposed SIP revisions are also expected to increase substantially. With the amendments, SIP calls for ozone nonattainment, and new SIPs resulting from NAAQS revisions (e.g., PM_{10}), the Agency's workload will no doubt become heavier. Thus the need for effective new guidance on exercising enforcement discretion in cases involving proposed SIP revisions has been magnified.

In recent years, a number of regulated parties successfully argued in SIP enforcement actions that the four month limitation on EPA review of original SIP submittals likewise applied to the Agency's review of proposed SIP revisions.[6] In light of these adverse opinions, we promulgated revised guidance on August 29, 1989 in an attempt to adapt agency policy to the unsettled judicial landscape.

The combined effect of GM and the amendments have largely superseded our existing policy guidance on this issue. We have therefore determined that a summary of GM and the amendments is needed to clarify the current law and provide a guidepost for deciding when to bring SIP enforcement actions while proposed SIP revisions are pending.

III. Summary of General Motors

In order to fully understand the significant shift in the law governing SIP enforcement, it is helpful to examine the Supreme Court's opinion in GM in light of the new 12 month review period for proposed SIP revisions.

A. No Statutory Deadline

In GM[7], the Supreme Court ruled that EPA review of proposed

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[6] See Duquesne Light v. EPA, 698 F.2d 456 (D.C. Cir. 1983); Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986); American Cyanamid v. EPA, 810 F.2d 493 (5th Cir. 1987); United States v. General Motors, 876 F.2d 1060 (1st Cir. 1989); United States v. Alcan Foil, 889 F.2d 1513 (6th Cir. 1989).

[7] In United States v. General Motors Corp., 876 F.2d 1060 (1st Cir. 1989), the First Circuit construed §110(a)(3) to implicitly contain the same four month deadline set forth in §110(a)(2) governing EPA review of original SIPs. Apparently concerned that EPA's institutional interest in enforcing existing

SIP revisions was not limited to a four month period. GM's principal argument was that since §110(a)(3) pertaining to SIP revision review requires EPA to approve such revisions if they meet the requirements of §110(a)(2), the four month deadline contained in §110(a)(2) also applies to proposed SIP revision review. In disposing of GM's argument, the Court concluded that §110(a)(3)'s reference to the "requirements of §110(a)(2)" was only directed to the substantive aspects of the proposed SIP revision, not the procedural. A contrary conclusion, stated the Court, would obviate the need for the additional procedural requirements of §110(a)(3). Since §110(a)(3), like §110(a)(2), mandated that proposed SIP revisions required reasonable notice and public hearings at the state level, to incorporate the procedures of (a)(2) into (a)(3) would be duplicative and result in a discordant reading of the statute.

Moreover, the Court marshalled further support for this conclusion by pointing to numerous other provisions in the statute which expressly imposed the same type of deadlines GM argued existed implicitly in §110(a)(3). Applying the rule of statutory construction which posits that the "expression of one is the exclusion of all others" the Court decided that, had Congress intended a four month deadline for review of proposed SIP revisions to apply, it would have said so.

GM's final argument was grounded on the language of §110(g), which gives the Governor of any state the authority to suspend any part of an existing SIP that would result in severe economic disruption if EPA has failed to act on a proposed SIP revision (which would alleviate the economic disruption) "within the required four month period". In summarily disposing of this contention, the Court concluded that reference to any required four month period in §110(g) did not by itself impose on EPA a general requirement to process all proposed revisions within four months. Rather, it merely authorized the Governor in such instances to suspend that portion of the existing SIP. "Whatever may be the correct interpretation of §110(g)...we do not think this passing mention can be inflated into a requirement that the [EPA] process each and every proposed revision within four months." 110 S. Ct. at 2538.

B. No Enforcement Bar

After deciding that no statutory deadline governed EPA review of proposed SIP revisions, the Court next held that rather than an enforcement bar, the appropriate remedy for unreasonable

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SIPs conflicted with its responsibility to approve SIP revisions, the court stated: "we think it dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself." Id. at 1066.

Agency delay in processing proposed SIP revisions was either a citizen suit pursuant to §304, compelling agency action, or a reduction in penalties by the district court in those cases where the source is prejudiced by the unreasonable delay.[8] The Court grounded its ruling on the absence of any reference to an enforcement bar in the statute, as well as §113(b)(2)'s express authorization of actions for penalties or injunctive relief whenever a source is in violation of the applicable SIP.

CONCLUSION

With the recent amendments to the Act, Congress expressly determined that 12 months is a reasonable period to review proposed SIP revisions. Therefore, the amendments have probably created a statutory presumption that failure to review a proposed SIP revision within the allotted 12 months is unreasonable. The GM ruling makes clear, however, that notwithstanding this new 12 month statutory period, enforcement of existing SIPs is authorized even when the Agency has exceeded its statutory review deadline. In determining whether to bring SIP enforcement actions involving proposed SIP revisions which have been reviewed beyond 12 months, Regions should consider the factors enumerated in this document on a case-by-case basis.

Our staff will be available to discuss specific cases with you. Please contact Peter Fontaine of the Air Enforcement Division if you have any questions regarding this policy.

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[8] According to the First Circuit, in those cases where the Agency's unreasonable delay has resulted in prejudice to the defendant, the District Court is endowed with the authority to reduce penalties. "If, for example, a trial court finds that the review process should have taken ten months rather than two years, it may decline to award penalties for the fourteen months of unwarranted delay." GM, 876 F.2d at 1068.

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